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05/17/90

# WARNER, NORCROSS & JUDD

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May 17, 1990

VIA TELECOPY AND CERTIFIED MAIL,  
RETURN RECEIPT REQUESTED

Ms. Beth A. Henning  
Assistant Regional Counsel  
United States Environmental  
Protection Agency  
Region 5  
230 S. Dearborn Street  
Chicago, Illinois 60604

Re: Section 106 Administrative Order  
Regarding Albion-Sheridan Township Landfill

Dear Ms. Henning:

This letter is submitted on behalf of Eagle-Picher Industries, Inc. ("Eagle-Picher") pursuant to paragraph 16 of the unilateral administrative order issued pursuant to CERCLA Section 106 regarding the Albion-Sheridan Township Landfill. Paragraph 16 of the order requires Eagle-Picher to notify U.S. EPA by May 17, 1990, whether it intends to comply with the order.

For the reasons set forth in our letter dated April 26, 1990, a copy of which is attached, Eagle-Picher has sufficient cause for refusing to comply with the order. As we pointed out in our April 26 letter, Eagle-Picher has no liability with respect to any releases or threatened releases at the Albion-Sheridan site that result from any activity that took place after Eagle-Picher sold its Union Steel Products division in 1982. Eagle-Picher and other respondents have provided information to U.S. EPA which establishes that the vast majority, if not all, of the drums and containers now located at the Albion-Sheridan site were placed there after June 1984, and all but eight were placed there after November 8, 1988. See memorandum dated May 6, 1985,

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from Ron Kooistra to Andy Hogarth, enclosed with our letter dated April 26, 1990, and Affidavit of Allan B. Currie, enclosed with James G. Fausone's letter to you dated April 26, 1990. It is clear from the available evidence that the alleged imminent and substantial endangerment at the site is primarily attributable to "midnight dumping" that took place after June 1984. Responsibility for this illegal dumping cannot be attributed to Eagle-Picher or any other respondent to the order.

U.S. EPA has not even attempted to establish any link between Union Steel's pre-1982 activities and the underground gasoline tanks and above-ground tank located at the Albion-Sheridan site. Despite this fact, however, U.S. EPA has included the emptying and cleaning of these tanks among the list of actions which Eagle-Picher and the other respondents are required to take under the order.

In light of the absence of any kind of relationship between Eagle-Picher and any of the objects and materials comprising the alleged imminent and substantial endangerment at the Albion-Sheridan site, U.S. EPA's issuance and enforcement of the order against Eagle-Picher is arbitrary and capricious. Recognizing the absence of any connection between Eagle-Picher and the materials presently located on the site, U.S. EPA has purported to base the order upon allegations of previous disposal of liquid wastes at the site by Eagle-Picher's Union Steel division. This is an invalid basis upon which to base an order under Section 106 of CERCLA.

Purely for economic reasons, and subject to the limitations stated in this letter, Eagle-Picher shall comply with the order. Our success in compliance, however, will depend in large part on the cooperation and reasonableness of U.S. EPA in its dealings with Eagle-Picher.

The terms of the order are overbroad and do not reflect U.S. EPA's intent with respect to the actions sought to be implemented at the Albion-Sheridan site, at least insofar as U.S. EPA disclosed to the respondents at the April 23 conference in your office. U.S. EPA has nevertheless refused even to discuss modifying the terms of the order to reflect the actions desired by U.S. EPA. During the last week, our telephone calls to you have not been returned.

In addition, despite repeated requests from the respondents and a wealth of available information documenting the land-fill's use as a general municipal, industrial and residential dump for the entire City of Albion and surrounding area for fifteen years, U.S. EPA issued the order against only four respondents. The gross unfairness of this situation was

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exacerbated when U.S. EPA agreed to drop Brooks Foundry as a respondent, a development which Eagle-Picher neither anticipated nor with respect to which Eagle-Picher was allowed to comment. We are now informed that U.S. EPA may name another respondent to the order whose identity U.S. EPA refuses to disclose. For the reasons set forth more fully in Scott Hubbard's letter to you dated May 8, 1990, U.S. EPA's refusal to identify the additional respondent, in conjunction with its refusal to discuss appropriate modifications to the time limits imposed by the order, is arbitrary, capricious, unreasonable and unfair.

As we pointed out in our April 26 letter, U.S. EPA has provided no information to us that would enable Eagle-Picher to procure access agreements from the person or persons in possession or control of the Albion-Sheridan site. U.S. EPA has thus far chosen to ignore the fact that the ownership of the site is presently unknown. Under the circumstances, we believe it is impossible to resolve the question of ownership of the site and obtain access agreements within the next three days, which is what the order requires. As noted previously, U.S. EPA has consistently refused to discuss modifying the terms of the order. Eagle-Picher shall not, under any circumstance, engage in potential illegal trespass.

For the reasons set forth above, as well as the arguments set forth in our previous correspondence to you, all of which are hereby incorporated by reference in this letter, it is Eagle-Picher's good faith belief that the available evidence provides an objectively reasonable basis for concluding that Eagle-Picher's former Union Steel division has no connection with the alleged imminent and substantial endangerment present at the Albion-Sheridan site.

Although Eagle-Picher has sufficient cause for refusing to comply with the order, Eagle-Picher estimates that the cost associated with litigating U.S. EPA's abuse of its authority under Section 106 would be very substantial in relation to the cost of complying with the Section 106 order as limited pursuant to our conference on April 23. Accordingly, Eagle-Picher intends to comply with the order to the extent the order, as implemented, is limited to the following:

1. Removal and disposal of the 27 55-gallon metal drums identified in the Removal Action Plan contained in the Administrative Record, eleven of which are empty.

2. Removal and disposal of the five small metal containers identified in the Removal Action Plan contained in the Administrative Record.

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3. Cleaning and, to the extent applicable, emptying (and related disposal of contents) of the two underground tanks and the one above-ground tank identified in the Removal Action Plan contained in the Administrative Record.

4. Erection of fencing and gates in accordance with the specifications provided to us by Mr. El-Zein on April 23, 1990.

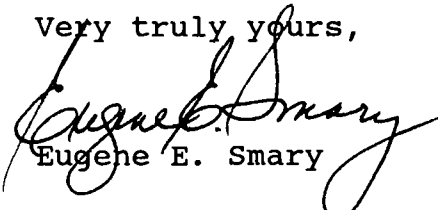
Eagle-Picher's agreement to comply with the order is based on the understanding that Seiler Tank Truck Service, Inc., is also agreeing to comply with the order.

Eagle-Picher has designated Paul D. Harper, Eagle-Picher's Director of Environmental Affairs and Safety, as the Project Coordinator for Eagle-Picher in implementing this order at the Albion-Sheridan site. Eagle-Picher has retained Great Lakes Environmental Services, Inc., to perform the actions set forth above. A work plan detailing the necessary actions will be submitted to you on or before May 22, 1990. As pointed out above, however, there appear to be substantial questions as to the current ownership of the site which may render Eagle-Picher unable to obtain an access agreement. Accordingly, Eagle-Picher believes that it will be impossible to comply with the implementation schedule set forth in the order.

Eagle-Picher expressly reserves any and all rights it may have to seek compensation, reimbursement, compensatory and consequential damages from any party against whom liability may properly lie in connection with the drums, tanks and other materials identified in the order. In addition, Eagle-Picher expressly reserves its right to seek reimbursement from the Fund in accordance with CERCLA.

We renew our heretofore ignored request that the time limits set forth in the order for submitting and implementing a work plan be modified to provide a reasonable opportunity for discussion with the party or parties to be named as additional respondents to the order. We also renew our request that the City of Albion be named as a respondent to the order.

Very truly yours,

  
Eugene E. Smary

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Enclosures

cc: Mr. Marc L. Greenberg  
Mr. Paul D. Harper  
Mr. Jason El-Zein